BEFORE THE
FEDERAL MARITIME COMMISSION

In the Matter of:	)	
Ocean Common Carrier and Marine Terminal	)	FMC Docket No.: 16-04
Operator Agreements Subject to the Shipping	)	
Act of 1984	)	

COMMENTS BY THE SOUTH CAROLINA PORTS AUTHORITY ON POSSIBLE MODIFICATIONS TO THE FEDERAL MARITIME COMMISSION'S RULES GOVERNING AGREEMENTS BY OR AMONG OCEAN COMMON CARRIERS AND/OR MARINE TERMINAL OPERATORS SUBJECT TO THE SHIPPING ACT OF 1984

The South Carolina Ports Authority ("SCPA") appreciates the opportunity to comment on the Federal Maritime Commission's ("FMC" or "Commission") proposed modifications to FMC regulations 46 CFR Part 535, entitled *Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984. See* 81 Fed. Reg. 10188 (February 29, 2016). By this comment, SCPA only addresses the proposed modifications to the marine terminal services agreement exemption under 46 CFR § 535.309. SCPA respectfully suggests that the proposed changes are far too broad and would impose considerable administrative and commercial burdens on port authorities, particularly operating ports such as SCPA.

I. INTRODUCTION

On February 29, 2016, the Federal Maritime Commission ("FMC") published an Advanced Notice of Proposed Rulemaking ("ANPRM") seeking the public's comments on possible modifications to the FMC's rules governing agreements by or among ocean common carriers and/or marine terminal operators subject to the Shipping Act of 1984, FMC Docket No. 16-04. *Id.* The ANPRM is the result of President Obama's Executive Order 13579 ("EO13579"), *Regulation and Independent Regulatory Agencies*, issued on July 11, 1011, which encouraged agencies to conduct periodic reviews of their regulations to determine whether those regulations

could be "modified, streamlined, expanded, or repealed" so as to make the agency's regulatory programs more effective and less burdensome in achieving the agency's regulatory objectives. *Id.* at 10188-10189.

In keeping with the spirit of the EO13579, the FMC published its *Plan for the Retrospective Review of Existing Rules* in which it sought comments on how to improve existing regulation from the carrier members of the major discussion agreements that are in effect under the Shipping Act. Based on the carriers' comments and the FMC's own review of regulations in parts 501 and 535, the FMC now seeks additional comments in the ANPRM regarding proposed modifications and changes to the following eight (8) areas before proceeding with a Notice of Proposed Rulemaking ("NPRM"):

> (I) the definition of capacity rationalization in § 535.104(e), a new waiting period exemption for space charter agreements in § 535.308, and the waiting period exemption for low market share agreements in § 535.311;
> **(II) the agreement filing exemption of marine terminal services agreements in § 535.309;**
> (III) the standards governing complete and definite agreements in § 535.402 and agreement activities that may be conducted without further filing in § 535.408;
> (IV) the Information Form requirements in subpart E of part 535;
> (V) the filing of comments on agreements in § 535.603 and the request for additional information on agreements in § 535.606;
> (VI) the agreement reporting requirements in subpart G of part 535;
> (VII) the modifications requested by the ocean carriers in their comments; and
> (VIII) non-substantive modifications to update and clarify the regulations in parts 501 and 503.

By this comment, SCPA only addresses the proposed modifications to the marine terminal services agreement exemption under 46 CFR § 535.309. Should the FMC advance these proposals to a notice of proposed rulemaking, SCPA respectfully reserves the right to address other aspects of the ANPRM.

II. SCPA'S ROLE AS AN MTO

SCPA owns and operates public seaport facilities in Charleston and Georgetown, South Carolina, as well as the South Carolina Inland Port in Greer, South Carolina. SCPA was established by the South Carolina General Assembly in 1942, as an instrumentality of the State possessing the powers of a body corporate. As described in its mission statement, SCPA:

> promotes, develops and facilitates waterborne commerce to meet the current and future needs of its customers, and for the economic benefit of the citizens and businesses of South Carolina. The SCPA fulfills this mission by delivering cost-competitive facilities and services, collaborating with customers and stakeholders, and sustaining its financial self-sufficiency.[1]

SCPA is a significant economic development engine for the state of South Carolina. It handles international commerce valued at more than $63 billion annually, while receiving no direct taxpayer subsidy.

SCPA's largest facilities are located in Charleston, where it operates five major ocean terminals capable of handling breakbulk and container shipments in addition to passenger vessels. All of SCPA's container terminal facilities are located at the Port of Charleston, where the primary focus is the movement of containerized shipments to and from the vessels calling the port. SCPA also owns and operates public marine terminals at Georgetown, which serves as a bulk and breakbulk facility. Both the Charleston and Georgetown facilities are owner-operated terminals, meaning the SCPA owns the terminals, operates all container cranes, manages and operates all container storage yards, and leads all customer service functions in both the yard and the lanes.

[1] South Carolina Ports Authority, Mission and Leadership, available at: http://www.scspa.com/about/mission-and-leadership/ (last visited on April 1, 2016).

As an owner-operated marine terminal, SCPA stands apart from many other Marine Terminal Operators ("MTOs"). As the Commission is well aware, the 1984 Shipping Act's definition of MTO lumps together public port authorities and private terminal operators.[2] While most public port authorities have only limited, if any, operating functions, and thus fall outside of many FMC MTO-specific regulations, those that operate their ports, like SCPA, must generally meet the same regulatory requirements imposed on private terminal operators. SCPA's position is thus unique when measured against both other MTOs and port authorities, and this unique character gives rise to SCPA's specific concerns about the proposed rule modifications announced in the ANPRM.

III. SCPA'S COMMENTS AND PROPOSED MODIFICATIONS TO THE ANPRM

The § 535.309 marine terminal services agreements filing exemption was put in place in 1992, after a multi-year review of the impact the shipping statutes and regulations had on the terminal services market. *See* 81 Fed. Reg. 10192. The exemption was primarily driven by the MTO practice of charging ocean carriers a flat throughput rate for combined stevedoring and terminal services via terminal service agreements, but *not* filing these rates with the Commission. *Id.* at 10193. Petitioners advocating for the exemption noted that filing requirements would be unduly burdensome given the difficulty of parsing stevedoring and terminal services rates from this flat throughput rate. *Id.* In addition, petitioners noted commercially sensitive data would lose its confidential status if subject to public filing requirements. *Id.*

[2] According to the Act, "[t]he term 'marine terminal operator' means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49." 46 U.S.C.A. § 40102(14).

The Commission notes in the ANPRM that is has reassessed the exemption and "believes that there is now a need for *certain* terminal services agreement information to be filed with the FMC given the increased cooperation of MTOs in conference and discussion agreements." 81 Fed. Reg. 10193 (emphasis added). However, the Commission's proposal would establish "as a standard Monitoring Report requirement in part 535 of the regulations, a rule to require that all of the MTOs, participating in any conference or discussion agreement on file and in effect at the FMC, submit to the FMC all of their effective terminal services agreements and amendments thereto." *Id.* This proposal would require nearly all MTOs, including SCPA, to file terminal services agreements with the Commission, including simple bilateral agreements between an MTO and individual common carriers.

As referenced in the ANPRM, the Commission's primary concern appears to be the increased cooperation between MTOs at major U.S. ports, including by agreements to implement new programs addressing security and safety measures, environmental standards, and port operations and congestion. *Id.* Given the proliferation of large ocean carrier alliances, there is quite naturally increased pressure on MTOs and ports to find ways to offset imbalances in commercial bargaining positions. The Commission is concerned that it is not in possession of adequate empirical data on the terminal services market to analyze the competitive impact of such cooperative programs and activities. More specifically, the Commission recently sought information and data from the parties to the Pacific Ports Operational Improvement Agreement ("PPOIA"), FMC No. 201227. According to the ANPRM, the Commission encountered difficulty in obtaining complete information from the PPOIA parties, and this difficulty in large measure informs the Commission's current proposal to require filing of terminal service agreements. *Id.*

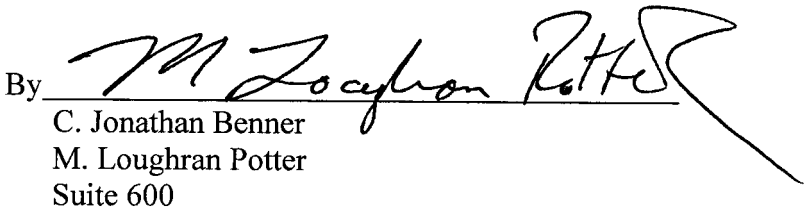
In SCPA's view, curtailing the § 535.309 exemption is unnecessary and not in keeping with the Commission's mission to foster a fair, efficient and reliable international ocean transportation system and to protect the public from unfair and deceptive practices. Whatever the Commission's experience was in the PPOIA context, the Commission has considerable leverage in the agreement review process to require agreement parties to provide adequate information or modifications to proposed agreements in order to avoid Commission invocation of its section 6(g) authority. 46 U.S.C. § 41307(b). There is no reason why this persuasive leverage should not be applied on an ad hoc basis in the context of particular agreement submissions. Ports such as SCPA are parties to numerous bilateral commercial agreements that are crucial to the functioning of the port. The suggestion of the ANPRM is that a port authority like SCPA, when faced with demands by large ocean carrier groupings for commercial concessions, would risk losing the administrative benefits of the 535.309 exemption simply by entering into discussion agreements with other ports and MTOs. New ocean carrier groupings are placing novel demands on ports and MTOs. The ANPRM's suggested approach appears to stifle, rather than encourage, innovative responses that would level the playing field.

At a minimum, SCPA believes the proposal is unnecessarily broad, and that a more narrowly tailored rule could alleviate the Commission's concerns without unduly burdening operating public port authorities. Such operating public port authorities have extensive agreements documenting strictly bilateral commercial undertakings which should be of little core regulatory interest to the Commission. These agreements do not reflect any large concentration of economic power. Quite simply, they do not have any bearing at all on fair, efficient, or reliable ocean transport, and by their very nature are far removed from unfair or deceptive trade practices. In short, whatever issues the Commission has had obtaining information from large

groupings, it should devise an approach to solving that problem that is not overly broad, and does not sweep in standard commercial relationships.

Respectfully submitted this 4th day of April 2016,

THOMPSON COBURN LLP

By 

C. Jonathan Benner
M. Loughran Potter
Suite 600
1909 K Street, N.W.
Washington, D.C. 20006-1167
Tel: 202-585-6900
Fax: 202-585-6969
Email: jbenner@thompsoncoburn.com
lpotter@thompsoncoburn.com

Attorney for South Carolina Ports Authority